

RENDERED: JANUARY 5, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000287-MR

DEWEY LYNN STRICKLER,
INDIVIDUALLY, AND AS PERSONAL
REPRESENTATIVE OF GOLDIE STRICKLER,
DECEASED

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 13-CI-00362

TOMMY B. MAYES

APPELLEE

& NO. 2016-CA-000304-MR

PNC BANK, NATIONAL ASSOCIATION,
SUCCESSOR TRUSTEE AND AS A
PERSONAL REPRESENTATIVE
OF DEWEY STRICKLER, DECEASED

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 13-CI-00362

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from a Simpson Circuit Court order granting summary judgment in favor of Tommy Mayes. As the record reveals no genuine issues of material fact, we affirm.

Background

On September 21, 1974, Dewey and Goldie Strickler (the Stricklers) entered into a contract to sell their farm to Tommy Mayes (Mayes). Because the Stricklers wanted to continue living in their home, the residence was reserved. Mayes believed, based on the contract, that he would be entitled to purchase the home for \$15,000 when both Dewey and Goldie died, and that the home would be maintained in reasonable condition. When Dewey Strickler died in 1982, his interest was transferred to a trust company as a trust. The trust was created for Goldie Strickler and was to ultimately benefit their son, Dewey Lynn Strickler (Son¹). PNC Bank currently serves as the Trustee of this trust. Goldie Strickler died in 2013.

¹ Because of the possible confusion in referencing Dewey Strickler and Dewey Lynn Strickler, Dewey Lynn will be referred to as “Son.”

After Goldie died and Son became the executor of Goldie's estate, Mayes contacted PNC seeking to have the property conveyed to him for \$15,000. Ultimately, PNC refused to convey the property (in part due to a disagreement as to the cost of repairing the property), disputing two specific paragraphs of the contract relating to the residence. Mayes brought this action against PNC as personal representative of Dewey Strickler, and against Son, individually and as personal representative of Goldie Strickler's estate, seeking specific performance and damages. All parties filed various motions for summary judgment. Ultimately, the trial court granted summary judgment in favor of Mayes. Appellants (PNC and Son, individually and as the personal representative of Goldie Strickler's estate) now appeal. Further facts will be developed as necessary.

Standard of Review

The standard of review governing an appeal of a summary judgment is well-settled. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary

judgment appropriate only “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR² 56.03. Because a summary judgment involves no fact finding, this Court’s review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Analysis

On appeal, the Appellant PNC Bank raises four issues. First, PNC contends that the trial court erred by finding that the contract entitled Mayes to purchase the house upon the deaths of the Stricklers. Second, PNC contends that the intent of the parties is a disputed question of fact. Third, PNC contends that the court erred by ruling PNC’s alleged affirmative defenses were not applicable. Fourth, PNC contends that the “reasonable condition” clause in the contract did not apply to the residence tract. PNC lastly contends that an award of attorney’s fees is barred.

Son’s attorney also filed a brief on Son’s behalf individually and as personal representative of Goldie Strickler’s estate. In that brief counsel endorses the arguments made by PNC but makes two additional arguments. First, counsel contends that the trial court erred by dismissing a counterclaim for abuse of

² Kentucky Rules of Civil Procedure.

process. Second, counsel argues that the trial court erred in granting the partial summary judgment interpreting the contract's maintenance provision to apply to the residence. After a careful review of the record, we disagree and affirm on all issues. Each issue will be addressed.

The Contract

On appeal, Appellants contend that the contract did not entitle Mayes to purchase the residence upon the death of the Stricklers, and in the alternative, if this Court finds that it did, then the contract is ambiguous. They also contend that the contract did not include the residence in the maintenance provision of the contract.

When interpreting a contract, “[o]ur review must begin with an examination of the plain language of the instrument. ‘In the absence of ambiguity, a written instrument will be enforced strictly according to its terms,’ and a court will interpret the contract’s terms by assigning language its ordinary meaning and without resort to extrinsic evidence.” *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 694 (Ky. 2016), quoting *Wehr Constructors Inc. v. Assurance Company of America*, 384 S.W.3d 680, 687 (Ky. 2012). A contract’s language is “ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *Id.* at 694-95, quoting *Hazard Coal Corporation v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010).

Here, there are two paragraphs in the contract that are in dispute.

Paragraph 1(b) relates to whether Mayes had a right to purchase the property upon the death of the Stricklers and Paragraph 10 relates to the maintenance provision.

Paragraph 1(b) states in relevant part,

[t]he Sellers are retaining the residence and certain outbuildings situated on the tract of land hereinbefore described as the Dewey Strickler residence and excepted from the described boundary of real property. The Purchasers agree upon Sellers request to purchase from the Sellers the residence tract for Fifteen Thousand (15,000) Dollars. The nature of the interest herein created being such that the *Sellers may retain the title, use and occupancy of the residence for and during the natural life of the last to survive if they so desire, with the Sellers, their estates or heirs being bound to sell and convey the residence tract unto the purchasers upon the death of the last survivor of the Sellers for an agreed price of Fifteen Thousand (\$15,000) Dollars*

The language here is not ambiguous and is very clear: upon the deaths of the Stricklers, Mayes was entitled to purchase the residence for \$15,000. As this language is not susceptible to a different interpretation, it is not ambiguous and should be interpreted strictly according to its terms.

Similarly, Paragraph 10 is also not ambiguous and should be interpreted according to its terms. Paragraph 10 states:

[e]ach party shall insure their respective interest in the improvements to the property and should the improvements be destroyed by fire or other casualty, the duties of the parties to sell and purchase shall in no way be affected. The Sellers shall maintain the improvements in a reasonable condition so long as they retain the

property and shall pay any taxes assessed against said property retained by the Sellers.

As the trial court accurately explained, Paragraph 10 of the contract required Sellers to maintain the residence in a reasonable condition.

Because both paragraphs are clear and not reasonably open to more than one interpretation, the paragraphs shall be interpreted by their plain meaning. Therefore, we agree with the trial court that “the parties’ agreement was not ambiguous because a reasonable person would not find it susceptible to different or inconsistent interpretations . . . [and] that the contract at issue is enforceable according to its terms.” There was therefore no question of law or fact remaining for the jury on these issues and summary judgment was appropriate.

Affirmative Defenses

On appeal, the Appellants contend that the trial court erred in ruling that PNC’s affirmative defenses were not applicable. They assert that the contract pertaining to Mayes’s right to purchase the home was an option contract and was not supported by necessary consideration. They also assert that the doctrine of laches bars Mayes’s claim.

An option contract is a contract not “for the purchase or sale of property, but a contract giving the optionee the privilege of purchasing it if he elects to take it within the time stated in the option.” *Miller v. Hodges*, 215 S.W.2d 99, 100 (Ky. 1948). Here, there was no “option” given to Mayes to purchase the

property within a certain amount of time. Instead, Mayes was to purchase the property upon the deaths of the Stricklers. We agree with the trial court that “the [c]ontract did not contain such an option, [and therefore] the argument regarding lack of consideration for said option is moot.”

The Appellants also contend that the doctrine of laches applies to bar Mayes’s claim and therefore the trial court erred by granting summary judgment in favor of Mayes. The doctrine of laches “serves to bar claims in circumstances where a party engages in unreasonable delay to the prejudice of others rendering it inequitable to allow that party to reverse a previous course of action.” *Plaza Condominium Ass’n, Inc. v. Wellington Corp.*, 920 S.W.2d 51, 54 (Ky. 1996).

Here, Mayes’s right to purchase the residence could only materialize in two ways: if the Stricklers demanded it during their lifetimes, or upon their deaths. They never demanded Mayes purchase the residence. Therefore, the only time which Mayes could purchase the property was upon the death of the last living Strickler, which is what he attempted to do when Goldie died in 2013. Laches arises based upon an unreasonable delay in asserting a right. Since Mayes exercised his right to purchase the property shortly after it arose, we agree with the trial court that the doctrine does not apply here. Therefore, we affirm the trial court on both affirmative defense findings because there are no issues as to material facts or law relating to these defenses.

Abuse of Process

Son's counsel argues on appeal that the trial court erred in granting Mayes's motion for summary judgment, which dismissed their counterclaim for abuse of process. Son believes it was an abuse of process to add Son as an appellant because Mayes should have known that Son did not have title to the property nor was he a party to the contract.

As the trial court correctly explained in its Order, an abuse of process claim "has two essential elements: 1) an ulterior process, and 2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109, 114 (Ky. 2010). "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." *Flynn v. Songer*, 399 S.W.2d 491, 494 (Ky. 1966), internal citations omitted.

Here, we agree with the trial court that Son failed to allege an ulterior motive to meet the first element of the tort. We also agree with the trial court that Mayes provided sufficient reasons to bring the action and there was no showing that Mayes attempted to use this action to obtain an objective not authorized by the process. We therefore affirm the trial court's finding that there were no genuine issues as to any material facts for this counterclaim.

Attorney's Fees

Finally, Appellants contend that the trial court erred in denying their motion to disallow attorney's fees in the case. While Appellants are correct that attorney's fees are no longer based only in equity (*see Bell v. Commonwealth, Cabinet For Health and Family Services, Department for Community Based Services*, 423 S.W.3d 742, 747-48 (Ky. 2014)), this issue is not ripe because there was no actual final or appealable order awarding attorney fees. The trial court merely denied Appellants' motion for summary judgment on the attorney fee issue, but the court did not make that order final and appealable under CR 54.02. Furthermore, the court has never entered an order granting attorney fees.

Conclusion

For the various reasons stated herein, we affirm on all issues.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Daniel N. Thomas
Hopkinsville, Kentucky

Kenneth A. Meredith, II
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Mark A. Thurmond
Franklin, Kentucky